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No. 85-517

In the Supreme Court of the United States

October Term, 1985

MILTON A. MILLER and MANDEL M. MILLER,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

BEST AVAILABLE COPY

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The most striking feature of the City's brief is that it *assumes* the answer to the central issue being litigated. That issue is whether there is a plain, adequate, and complete state remedy.

Please recall, under this Court's decision in *Fair Assessment in Real Estate v. McNary* (1981) 454 US 100, federal courts *must* assume jurisdiction *if* there is no plain, adequate, and complete state remedy.

The Millers' Petition discussed the California scheme under the 1911 Act, whose underlying philosophy of no judicial invalidation is expressed in Cal Streets & Hwys Code §5369:

> "*No assessment, . . . and no proceedings* prior to the assessment, *shall be held invalid by any court for any error,* informality, *or other defect* in the same, where the resolution of intention of the legislative body to do the work, has been actually published as provided in this division." (Emphasis added.)

The Millers' Petition showed that the California courts routinely hew to this philosophy.[1]

The City's primary response is to *assume* that adequate remedies exist. (See, e.g., the City's framing of the "Question Presented." [City Br., p i])

While the City avers at pp 15-19 of its brief that it will address this issue, nothing in that discussion even attempts to describe the supposedly adequate remedies. *None* of the statutes described in the Millers' Petition is even *cited* by the City. Those statutes provide Constitutionally inadequate notice by publication (contrary to *Mullane v. Central Hanover Bank & Trust Co.* [1950] 339 US 306 and *Mennonite Bd. of Missions*

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[1]The City's response that the cases cited by the Millers make it ". . . apparent . . ." that "[t]he California Courts have continued to review assessment districts . . . (City Br., p 18) is preposterous. What the cases make ". . . apparent . . ." is that the Legislature's mandate that assessments not be invalidated has been slavishly followed by the California judiciary.

v. Adams [1983] 462 US 791), permit a government agency to condemn land and then assess the condemned owner the full amount of his just compensation *plus* the agency's attorneys' and appraisers' fees (contrary to *Norwood v. Baker* [1898] 172 US 69 and *Myles Salt Co. v. Board of Comm'rs* [1916] 239 US 478), permit an administrative agency to operate without judicial review (contrary to *St. Joseph Stock Yards Co. v. U.S.* [1936] 298 US 38), and permit a bureaucrat (rather than a court) to determine a component of just compensation (contrary to *Monongahela Nav. Co. v. U.S.* [1893] 148 US 312).

The City ignores each of the statutes and each of the cited discussions of this Court which the statutes violate. How can such argument by evasion assist this Court? If anything, it demonstrates the lack of bona fides in the City's position.

The only substantive comment offered by the City is that *seventy years ago,* in *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal 24, the California Supreme Court overturned *one* assessment. (City Br., p 18) What the City does *not* tell this Court is that *Spring Street* has *never* been followed in the ensuing seventy years.[2] Rather, as in *White v. County of San Diego* (1980) 26 Cal 3d 897, 908, *Spring Street* is referred to as ". . . exceptional . . ." and disregarded. "Exception" is indeed the word for *Spring Street.* The general rule is that the property owner routinely receives less than short shrift. Indeed, he gets no shrift at all.

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[2]As one scholarly commentator noted, "For those who still desire to raise objections to the [assessment] proceedings, some support can be found in a few cases. Most of these decisions are old and are probably bad law, even though they have not been expressly overruled." (Nichols, *How Not to Contest Special Assessments in California or You Can't Beat City Hall* [1965] 17 Stan L Rev 247, 256)

The City's bland assumption that state court remedies exist, coupled with its refusal to discuss the statutes and cases which belie its assumption, confesses the Constitutional inadequacy of the California scheme and shows the necessity for this Court's intervention. Because of the rubber stamp treatment accorded 1911 Act assessments by the California courts, California government agencies have become used to this type of non-analytical argument. It always prevails in the California courts.

There is a need for the Federal courts to assume jurisdiction and right this Constitutional wrong.

CALIFORNIA CITIES DO NOT NEED THIS DRACONIAN SCHEME IN ORDER TO OPERATE

The primary argument raised by the City is that California government agencies need the 1911 Act in order to function properly. (City Br., pp 9-14)

There are two responses.

First. Assuming, *arguendo,* the truth of this assertion, it is irrelevant when the Constitutional rights of citizens are steam-rollered in the process. As this Court aptly said in *Watson v. Memphis* (1963) 373 US 526, 537:

> "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

Second. The City's brief makes it seem as though the 1911 Act is the *only* assessment district legislation in California. That is false.[3]

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[3]Even if true, it is hard to see how a challenge to any *individual* project (like the one-block street widening involving two property

A skim of the California Streets & Highways Code shows no fewer than 14 other assessment acts in that Code alone.[4] The following pertinent comparisons with the 1911 Act emerge.

Item: None contains a direction like the 1911 Act (Cal Streets & Hwy Code §5369) that the judiciary is without power to interfere with any municipal decisions.

Item: None contains the multifarious waiver, "cure" of defect, and city council finality provisions of the 1911 Act. (Cal Streets & Hwys Code §§5003, 5221, 5368, 5369; Cal Pub Cont Code §§20420, 20431, 20432)[5]

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owners at bench) could have a generally crippling impact on local government.

[4]See Cal Streets & Hwys Code §§1160 et seq. [permanent road divisions]; 8100 et seq. [Separation of Grade District Act]; 10000 et seq. [Municipal Improvement Act of 1913]; 11000 et seq. [Pedestrian Mall Law of 1960]; 18000 et seq. [Street Lighting Act of 1919]; 18300 et seq. [Street Lighting Act of 1931]; 18600 et seq. [Municipal Lighting Maintenance District Act of 1927]; 19000 et seq. [Highway Lighting District Act]; 22000 et seq. [Tree Planting Act of 1931]; 22500 et seq. [Landscaping and Lighting Act of 1972]; 26000 et seq [boulevard districts]; 27000 et seq. [Bridge and Highway District Act]; 35100 et seq. [Parking District Law of 1951]; and 36500 et seq. [Parking and Business Improvement Area Law of 1979].

[5]Nine of them contain some waiver provisions. (Cal Streets & Hwys Code §§10012, 10310.2, 10312, 10355, 11309, 18076, 18364, 18691, 22093, 22509, 26003, 35275, 35469) But in 8 of those, the *amount* of the assessment is determined *first*, so the property owners know *what* they are waiving. In the ninth, if a majority of the property owners protest formation of the district, the process automatically terminates, with no ability of the City Council to override the majority protest.

Under the 1911 Act, of course, the amount is determined *after* construction (Cal Streets & Hwys Code §§5360 et seq.) and the City Council *can* impose the assessment notwithstanding a protest by the majority (Cal Streets & Hwys Code §5222).

Item: In 8 of the statutes, the amount of the assessment is determined *first,* so the property owners (and the City Council) know what they are approving or opposing. (Cal Streets & Hwys Code §§10204, 18041, 18340, 18660, 22080, 22567, 22622, 26130, 35257) By contrast, under the 1911 Act, the assessment is not determined until construction is completed. (Cal Streets & Hwys Code §5360 et seq.)

Item: In 8 of the statutes, a protest by a majority of the property owners causes proceedings to terminate. The City Council may not override the protest. (Cal Streets & Hwys Code §§1177, 11306, 19111, 22092, 26066, 27072, 35264, 35469.6, 36523) Under the 1911 Act, the City Council may do as *it* pleases, regardless of whether the affected property owners want the "improvement." (Cal Streets & Hwys Code §5222)

An assessment statute adopted in 1979 shows that local government can live without the odious features of the 1911 Act. Under the Geologic Hazard Abatement District Act (Cal Pub Res Code §§26500 et seq.), which allows use of the 1911 Act assessment procedures (Cal Pub Res Code §26587), a detailed plan must be prepared *before* the district is formed (Cal Pub Res Code §§26509, 26553), notice is given by certified mail (Cal Pub Res Code §26561), and protest by a majority causes abandonment of the project (Cal Pub Res Code §26566).

Under the Geologic Hazard system, the property owners know *what* they are facing, receive *actual* notice, and *can* control their own destiny by majority opposition. *None* of those are provided under the 1911 Act.

The 1911 Act is *sui generis.* Its unconstitutional features are present in no other assessment district legislation.

It is time for the Federal courts to examine those unconstitutional features, to right the Constitutional deprivation. The California courts have meekly accepted the Legislature's directive that the courts not review.

CONCLUSION

The Constitutional deficiencies in the 1911 Act assessment scheme are manifold.

The City's non-analytical brief and its studied refusal even to *cite* the offending statutory provisions (let alone discuss them) speaks volumes. The California courts have, for generations, permitted such non-responsive presentations to prevail. As a result, property owners have no remedy in the California courts.

There is a need for Federal Court intervention.

The Millers pray that a writ issue.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 1, 1985, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)